IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1176

CITY OF MEMPHIS, WYETH CHANDLER,
THE COUNCIL OF THE CITY OF MEMPHIS,
AND EDWIN McBRAYER,

PETITIONERS,

VS.

N. T. GREENE,
ELNORA PRIEST CROSS,
EDWIN OWENS, AND
CAROLYN BURSE,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the Court of Appeals is now reported at 610 F.2d 395. The Opinion of the District Court is not reported but is printed in Appendix A to the Petition at pp. 19-37.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether any intent necessary to establish a violation of 42 U.S.C., Section 1982 and the Thirteenth Amendment to the United States Constitution can be inferred from a "stark" pattern of racial discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the Appendix to the Petition at pp. 3-5.

STATEMENT OF THE CASE

Procedural Background

The Petitioners' statement of the procedural background of this case is substantially correct. There are, however, certain points which Respondents feel are worthy of note.

It should first be noted that following the Sixth Circuit's initial remand (Greene I) 535 F.2d 976 (6th Cir., 1976) the district court not only allowed intervention by Respondents Burse, Owens, and Cross, but also allowed an amended complaint which included specific allegations that Respondents' rights as protected by 42 U.S.C. 1982 would be violated by the closing of West Drive because the closing would decrease the value of the real property of the black residents of the area north of the proposed closure. The action, therefore, became much broader following the remand and was presented to the district court accordingly.

In remanding Greene I to the district court for trial, the United States Court of Appeals for

the Sixth Circuit by way of dicta (the characterization given the comments by the Court itself, A41) stated:

> To establish a Section 1982 or 1983 claim on remand, Greene must prove his allegations that City officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively command an inference of racial motivation.(A17)

This language is of particular importance in that it appears that the district court read this language as setting the parameters of its consideration of Plaintiff Greene's initial allegations as well as the expanded allegations and proof presented by Respondents. Consequently, it appears that the focus of the court's inquiry on remand was to ascertain whether whites had sought street closings and had been granted same in situations in which similarly identified blacks had sought street closings but had been denied.

Following the District Court's adverse ruling, Respondents sought a Stay Pending Appeal but this request was denied. Due to cost considerations, no appeal was taken from this adverse ruling. On or about February 27 , 1978, Defendant proceeded with the closing of West Drive although sworn representations had been made that such would not be done until the litigation was over.

An appeal was taken to the Sixth Circuit Court of Appeals, which reversed the judgment of

the district court. The cause was remanded for the fashioning of appropriate injunctive relief.

STATEMENT OF FACTS

Because of the thoroughness of the Statement of Facts in the Petition, Respondents will mention only those facts not adequately covered or noted therein. Geographically, and by street name, the proper focus is on Jackson Avenue, a major thoroughfare running east and west in the City of Memphis. The residents to the north of Jackson Avenue are all black. (Tr. 323-324). The residents immediately south of Jackson Avenue are all white. (Tr. 323-324). West Drive, the thoroughfare in question, represents Springdale's southerly extension through the all white Hein Park area. Springdale runs north and south through the all black neighborhood but reaches its terminus at the north side of Jackson Avenue. Except for the change of nomenclature, the same Springdale Street that runs throughout the black area is extended through the all white Hein Park area by West Drive, which begins where Springdale Street leaves off on the northern side of Jackson Avenue. Inasmuch as West Drive represented a logical and convenient extension of Springdale Street, many of the black residents of the area north of Hein Park used it as an essential and convenient thoroughfare for both pedestrian and vehicular traffic.

In July of 1973, the residents of the Hein Park area initiated governmental procedures to close off West Drive at its terminus with Jackson Avenue

so as to effectively "dead-end" Springdale at the point where it exited the black community and entered the white community. The procedure followed by the residents in having West Drive closed involved the two property owners on either side of West Drive at its connection with Jackson Avenue purchasing from the City that section of West Drive, the public street, that bordered their property. According to the City of Memphis, the other residents along the street were not legally required to take part in the process of closing the street. This was the first time in the entire history of the City of Memphis that this procedure was employed to close a dedicated and "in use" public thoroughfare. [1]

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[1] The following findings made by the district court are also noteworthy:

- That Hein Park "was developed well before World War II as an exclusive residential neighborhood for white citizens, and these characteristics have been maintained". (A 21).

- That the black citizens who live north of Hein Park are "primarily the persons who will be inconvenienced by the so called closing of West Drive". (A21).

- That Ms. Sara Terry, a white resident at 732 West Drive, testified that the closure was being sought to eliminate "undesirable traffic". (A23).

- That the proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. (A32).

- That the closure of West Drive, in the manner adopted by the City Council, will have a disproportionate impact on certain black citizens. (A34).

- That the Court "should refrain from applying its judgment on the merits even though the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the Fire and Police Departments, and the inconvenience and delay to Sanitation Department employees:". (A 36).

Prior to the West Drive incident, this process had only been used to close alleys and dedicated, but not opened, streets. Nor was the closing here a part of a large comprehensive community preservation effort; to the contrary it represented only the wishes of the island community of Hein Park. According to documents and testimony, the residents felt this action necessary to bring about tranquility and to rid themselves of "undersirable traffic" coming through the community. There was absolutely no proof presented as to why other less restrictive means of decreasing or controlling traffic were not tried. Although questions were raised regarding these other possibilities, the record is completely void as to why measures such as decreased speed limits, limited access hours, speed breakers, or rigid enforcement of speed limits were not feasible means of curbing any undesirable traffic. All other entrances to the Hein Park area remain open, particularly the south end of West Drive which connects with North Parkway, one of Memphis' main thoroughfares. The North Parkway-West Drive intersection is populated totally by whites.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Decision Below Does Not Raise The Question Presented In The Petition*

Although Petitioners state the Question Presented as one involving the requisite intent necessary to establish violations of 42 U.S.C. Section 1982, and of the Thirteenth Amendment, that question was not passed upon by the Sixth Circuit and hence is not appropriate for review here. To the contrary, the Court of Appeals stated:

> We expressly leave open here, the question to what extent intent is ever an element of the Plaintiffs' case under Section 1982. (A57)

While Petitioners set forth two questions as presented for review in this matter, both questions, in essence, raise the question of intent. This matter is, therefore, one in which the only question for which certiorari is sought is one that was not passed upon below. It is well established that in such cases the writ should not be granted. McCullough v. Kammerer Corp., 323 U.S. 327, (1945) and Abbott Laboratories v. Gardner, 387 U.S. 136, (1967).

The thrust of Judge Celebrezze's dissent and of the Petitioners' argument, is that the majority should have required a showing of intent or purpose to establish a violation of Section 1982, that the standards for establishing a violation of Section 1982 should be the same as for establishing a violation of the Equal Protection Clause, and that the closing of West Drive was a proper exercise of the city's police powers. The simple truth of the matter is that the court below found it unnecessary to decide the issue of whether a showing of intent is required to establish a violation of Section 1982 because "under the unique circumstances shown here" (A58) intent was established if it is required. This is the only logical explanation for Judge Engel's comment that "we expressly leave open here the question to what extent intent is ever an element of the Plaintiffs' case under Section 1982". (A57). If this Court's holdings in Washington v. Davis, 426 U.S. 229, (1976) and Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, (1977), are read to mean that intent is required to establish

a violation of 42 U.S.C. 1982, then the decision of the Sixth Circuit should stand because the court in fact found intent. If, on the other hand, intent is not required, the Sixth Circuit's findings of intent can be treated as mere surplusage and the decision allowed to stand on the indicia of discrimination cited by the district court and the Court of Appeals' majority opinion.

Although the majority of the court below expressly avoided the question of the extent that intent is ever an element of proof under Section 1982, it is clear that the Court did not rest its decision on impact alone but determined that the instant case is among those in which the disparate impact is so stark that intent (if it is necessary) to establish a violation of 42 U.S.C. 1982) may be inferred. See Yick Wo v. Hopkins, 118 U.S. 356, (1886); Guinn v. United States, 238 U.S. 347, (1915); Gomillion v. Lightfoot, 364 U.S. 339, (1960). See also Turner v. Fouche', 396 U.S. 346, (1970) and Sims v. Georgia, 389 U.S. 404 (1967).

In summary, Judge Engel conducted the "sensitive" inquiry, Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, and gave the required "liberal construction" to 42 U.S.C. 1982, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and found that the proof was sufficient to support an inference of intent.

Accordingly if Petitioners attempt only to present the question of whether intent is necessary to establish a violation of 42 U.S.C 1982,

the foregoing discussion illustrates that that question is, at best, an academic one and that, therefore, certiorari should not be granted. Regardless of how the Petitioner attempts to assert the question, the clear implication therefrom is that the Court of Appeals decided the case on the basis of impact alone. This is clearly not the case in that the Sixth Circuit, is reaching its decision, looked to and was guided by, indicia much stronger than impact alone.

2. The Authorities Cited By Petitioners Are All Distinguishable

While most of the arguments presented by Petitioners have been addressed above, there are some authorities relied upon by Petitioners which are clearly distinguishable. Petitioners rely heavily upon Mr. Justice Black's discussion of the applicability of the Thirteenth Amendment to the facts presented in Palmer v. Thompson, 403 U.S. 217, (1971). At the outset, it should be noted that any discussion of the Thirteenth Amendment in Palmer is of little value to the disposition of this case in that the major focus of the analysis in that case was on an equal protection violation under the Fourteenth Amendment. The denial of relief pursuant to the Thirteenth Amendment was almost parenthetical. In essence, what Mr. Justice Black said regarding the Thirteenth Amendment was that, although Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968), held that Congress has the power to "rationally determine what are the badges and incidents of slavery, and the

authority to translate that determination into effective legislation", id. at 440, Congress had passed no law to regulate the opening or closing of swimming pools. Palmer, 403 U.S. 227. Congress has, however, passed a law that establishes that the denial of the right to any citizen of the same right as is enjoyed by white persons to "hold" property is a "badge or incident of slavery" and violated of the Thirteenth Amendment. That law is 42 U.S.C., Section 1982. That fact is pivotal in the distinction between Palmer and the instant case.

In passing, however, it is instructive to note another observation made by Mr. Justice Black in Palmer. Having held that the record did not show state action affecting blacks different from whites, he warned that should citizens of Jackson or any other city be able to establish in court that public tax supported swimming pools are being denied to one group because of color and supplied to another, such persons will be entitled to relief. The purpose of this statement was to distinguish the situation presented in Palmer, where pools that remained open were not supported by public taxes and where the city had severed all its responsibility for maintenance, from the situation such as that presented by the instant case. In the instant case, the City remains fully responsible for the upkeep of West Drive, and public taxes, including those paid by respondents, will be used to support the maintenance.

Petitioners also rely heavily on the case of Personnel Administrator of Massachusetts v. Feeney

_____ U.S. _____ 99 S.Ct. 2282, 60 L.Ed. 2d 870 (1979) and Judge Celebrezze's treatment of that case in his dissent from the decision below. First of all, Feeney, does not establish a new definition or standard of intent, but in the words of Judge Celebrezze provides an "elaboration" of the "Washington v. Davis and Arlington Heights' impact-plus test". (A67). Further evidence of this is provided by the fact that this Court in Feeney cites with approval, Yick Wo v. Hopkins, supra, Quinn v. United States, supra, Lane v. Wilson, supra, and Gomillion v. Lightfoot, supra, all of which support Respondents' contention that if intent is indeed required to establish a violation of 42 U.S.C. 1982, the evidence in this case was sufficient to provide the bases for an inference of such intent. 60 L.Ed.2d 883.

Furthermore, insofar as Judge Celebrezze contends that the treatment accorded the white citizens who attempted to close West Drive is consistent with approvals granted in all other cases, such is clearly not the case. First of all, it is uncontradicted that the closing of West Drive was indeed unique in every sense of the word and that the City, up until this effort was undertaken had never used the procedure in question here to close a public thoroughfare. There is simply no comparison. Consequently, to the extent that Judge Celebrezze contends that the black persons who objected to the closing were treated precisely the same as whites, Respondents respectfully submit that his dissent is clearly without any factual basis.

Petitioners also contend that the closing of West Drive by the City of Memphis was a legitimate exercise of the City's police powers. This contention fails, however, because it is well established that an otherwise valid constitutional power cannot be used to attain an unconstitutional result. Western Union Telegraph Company v. Foster, 247 U.S. 105, (1918).

Petitioners cite Arlington County Board v. Richards, 434, U.S. 4, (1977)as supportive of their contention that the closing of West Drive as a legitimate exercise of the City's police powers. Richards is distinguishable in at least two major respects. First, Richards, did not involve a classification on the basis of the "paradigm" of race. 60 L.Ed.2d, 883. Consequently, the inquiry into the rationality of the distinction between residents and non-residents as was the case in Richards, is not subjected to the same scrutiny as is the racial situation presented by the instant case.

Furthermore, as a factual matter, the zoning action taken in Richards, was by no means an action taken solely at the behest of a handful of residents, but was pursuant to an overall policy implemented by way of an ordinance. Richards, 434 U.S. 6. At no time have the residents of Hein Park and West Drive contended that their action was designed to promote the "general" welfare. To the contrary, the proof shows that the closing of West Drive as requested by the Hein Park residents will simply bring about more traffic and congestion to the areas

immediately east and west of the Hein Park area. (A28). It is, therefore, clear that Richards is inapposite.

3. This Case Presents Unique Circumstances And Is Not Proper For A Writ Of Certiorari

Inasmuch as the Sixth Circuit classifies this case as one presenting "unique circumstances" it is proper to equate this matter with that presented to this Court in the case of Rice v. Sioux City Cemetery, 349 U.S. 70, (1954), a case characterized by Mr. Justice Frankfurter as presenting "rather unique circumstances" 349 U.S. p. 75, and in which the Court stated: "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. 349 U.S. at 74.

The facts in this matter illustrate clearly that many of the questions raised herein and many of the facts presented are quite academic and episodic. It is, therefore, clear that no special and important circumstances exist so as to justify the granting of the writ of certiorari. Indeed, as the *amicus curiae* brief points out, this case is governed by Gomillion v. Lightfoot, 346 U.S. 339 (1960) in that the closing clearly benefited the white residents of Hein Park to the detriment of the black residents of the area immediately north of Hein Park.[2]

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[2] The practical effect of the Opinion below is to deny equal protection of the law to the white residents of Hein Park. It is perfectly obvious from the pleadings of the Plaintiffs, and from the opinion from the Court of Appeals that the only reason why the City's action was challenged, and the only reason why the Court of Appeals struck it down, was because the residents of the area to be benefited were white. (Emphasis Added). If Hein Park had been predominently black, there would have been no ruling that the City's action violated the Thirteenth Amendment." [Brief Amicus Curiae, pp.7-8]

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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This, the 24th day of March, 1980.

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